

AMENDMENTS TO RULE 27

RULE 27 is amended as follows:

RULE 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter that may be cognizable in this court may file a verified petition. The petition shall be entitled in the name of the petitioner and shall show: [~~(A)~~] (1) that the petitioner expects to be party to an action cognizable in this court but is presently unable to bring it or cause it to be brought, [~~(B)~~] (2) the subject matter of the expected action and the petitioner's interest therein, [~~(C)~~] (3) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, [~~(D)~~] (4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and [~~(E)~~] (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing, the notice shall be served in the manner provided in Rule 4 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner prescribed by Rule 4, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral

examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character prescribed by Rules 34 and 35.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules[7] **or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken,** it may be used in any other action involving the same subject matter subsequently brought, in accordance with the provisions of Rule 32(e).

(b) Pending Appeal. If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take depositions, upon the same notice and service thereof as if the action was pending. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character prescribed by Rules 34 and 35, **and** thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in court.

(c) Perpetuation by Action. * * *

(As amended July 28, 1988, eff. Nov. 1, 1988; _____, 2000, eff. __, 2000.)

ADVISORY COMMITTEE NOTE

The CIT and Fed. R. Civ. P. are substantially similar and, unless the language of the Federal Rule would be inapplicable, the Committee recommends adopting the Federal Rule. With respect to subdivision (a)(2), the provisions are virtually identical except that the Fed. R. Civ. P. refers to service in the manner "provided in Rule 4(d) for service of summons," whereas the CIT rule refers only to Rule 4. The Historical Notes to the Fed. R. Civ. P. indicate that the reference to 4(d) is erroneous:

"Rule 4(d)", referred to in subd. (a)(2), is
Rule 4(d) prior to amendment by Supreme Court of

the United States order dated Apr. 22, 1993, which failed to make conforming amendments to subd. (a)(2) of this rule. Rule 4(d) does not relate to manner of service which is provided for in Rule 4(e)(2) and (g) to (j).

Hence, the Committee recommends retaining the current reference to Rule 4.